

ESTATE OF EDWARD LEWIS PITT

IBIA 77-29

Decided October 17, 1977

Appeal from an order determining fair market value of merchantable timber on Tract
Nos. 124-4490 (Edward Lewis Pitt) and 124-4491 (Lillian Pitt) as of June 9, 1976.

Modified.

1. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Yakima Tribes: Generally

A statutory option held by the Tribe to take such interests in lands which pass to specific heirs or devisees who are not enrolled members of the Tribe does not vest any rights in said interests until payment by the Tribe of the fair market value as determined by the Administrative Law Judge, after hearing if demanded, plus unpaid interest.

2. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Yakima Tribes: Generally

Fair market value date is considered to be the date of hearing to determine value

or if no hearing, the date the Judge makes an independent finding and judgment as to the fair market value of the interest to be taken.

APPEARANCES: Hovis, Cockrill & Roy by Timothy Weaver, Esq., for the Yakima Tribe; MacDonald, Hoague and Bayless, by Robert Free, Esq., for the Devisees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal by the Yakima Tribe from the decision and order of Administrative Law Judge Robert C. Snashall dated December 8, 1976, determining the fair market value as of June 9, 1976, of merchantable timber on the Yakima Reservation referred to as Tract Nos. 124-4490 (Edward Lewis Pitt) and 124-4491 (Lillian Pitt) to be \$163,238.70 and \$142,181.08, respectively.

After a hearing held on June 3, 1975, at Warm Springs, Oregon, Judge Snashall issued an order and decree of distribution dated July 16, 1975, wherein he determined, among other things, that Lewis Edward Pitt died testate on December 30, 1973, leaving his trust property located on the Yakima and Warm Springs Reservations to his children, Charlotte Logsden, Lillian Pitt and Lewis E. Pitt, Jr., with income therefrom to his wife Elizabeth T. Pitt during her lifetime; the rest, residue and remainder, both real and personal to his wife, Elizabeth T. Pitt. The decedent's wife and children were enrolled Warm Springs Indians.

A caveat included in the July 16, 1975, order and decree warned that the devisees' interests in the trust properties on the Yakima Reservation "may be subject to divestiture by Yakima Tribal purchase pursuant to the Yakima Act of December 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607 (1970)); accordingly no distribution shall be made until December 30, 1976."

The Yakima Tribe acting by and through its land committee elected to purchase all of devisees' interests in the trust properties located on the Yakima Reservation as listed by the BIA in its April 15, 1975, inventory and appraisal attached to the July 15, 1975, order approving will. 1/ Upon being notified of said election and documents having been filed evidencing, in addition to said election,

1/ ESTATE OF EDWARD LEWIS PITT, YAKIMA ALLOTTEE NO. 124-4490
INVENTORY AND APPRAISEMENT COVERING THE YAKIMA ESTATE
DECEASED: DECEMBER 30, 1973

<u>Tract No.</u>	<u>Description and Acreage</u>	<u>Interest</u>
124-4490 (Original Allotment)	SE1/2NE1/4 and Lots 1 & 2 in Sec. 1, T. 7 N., R. 14 E., W.M., WA., cont. 161 a., m/l. Appraised value: \$89,000	1/1
124-709 (Minnie Parker)	NW1/4 Sec. 15, T. 9 N., R. E., W.M., WA., cont. 160 acres, m/l. Appraised value: \$1,875.00	1/8
124-710 (Chapman Snungayah)	SW1/4NW1/4 and NW1/4SW1/4 Sec. 16 and E1/2SE1/4 Sec. 17, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: \$2,730.00	1/24
124-711 (Martie Snungayah)	SE1/4 Sec. 18, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: \$1,250.00	1/8
124-1569-A (Charlot Edwards)	NE1/4NW1/4 Sec. 35, T. 11 N., R. 19 E., W.M., WA., cont. 40 acres, m/l. Appraised value: \$39,400.00	1/1
124-1850 (Julia Edwards)	E1/2SW1/4SE1/4 Sec. 8, T. 11 N., R. 18 E., W.M., WA., cont. 20 acres, m/l. Appraised value: \$1,350.00	1/8

the appraisal dated April 15, 1975, and transfer of purchase funds to the deposit of this estate, Judge Snashall on November 11, 1975, issued a supplemental order of distribution, ordering that all right, title and interest of the aforementioned devisees in said trust properties on the Yakima Reservation vest in the United States in trust for the Yakima Tribe. The Judge advised that the order becomes final 60 days from the date of mailing unless within such period an aggrieved party shows cause why said order should not become final. The devisees through counsel on December 29, 1975, protested the appraisal of said trust properties and requested a hearing for the purpose of determining the fair market value thereof. The devisees contended that the appraisal of said property incorporated in the November 11, 1975, decree and order was substantially below fair market value.

fn. 1 (continued)

124-4491	Lots 3 & 4 and S1/2NW1/4 Sec. 1, T. 7	1726/3780
(Lillian Pitt)	N., R. 14 E., WM., WA., cont. 163 acres, m/l.	
	Appraised value:	\$34,692.00

Total Value on Yakima Reservation ----- \$170,297.00

Yakima Agency IIM Account No. P-166 as of D.O.D ----- None

Yakima Agency IIM Account No. as of 4-15-75 ----- 1,798.80

Total Value of Yakima Estate ----- \$172,095.80

April 15, 1975. I hereby certify that the foregoing is an accurate inventory according to the records of the Yakima Indian Agency, Toppenish, WA 98948, of the trust real property or interest therein owned by Edward Lewis Pitt, Yakima Allottee No. 124-4490, at the time of his death, December 30, 1973.

The above values are based on appraisals performed by staff appraisers of the Bureau of Indian Affairs.

Realty Officer

Judge Snashall on January 26, 1976, issued a modification order reflecting that an error existed in the appraised value of three tracts included in the April 15, 1975, inventory. Incorporated therein was a corrected inventory dated January 6, 1976. 2/

2/ CORRECTED INVENTORY

ESTATE OF EDWARD LEWIS PITT, YAKIMA ALLOTTEE NO. 124-4490 INVENTORY
AND APPRAISEMENT COVERING THE YAKIMA ESTATE DECEASED:
DECEMBER 30, 1973

<u>Tract No.</u>	<u>Description and Acreage</u>	<u>Interest</u>
124-4490 (Original Allotment)	Sl/2NE1/4 and Lots 1 & 2 in Sec. 1, T. 7 N., R. 14 E., W.M., WA., cont. 161 a., m/l. Appraised value: \$89,000	1/1
124-709 (Minnie Parker)	NW1/4 Sec. 15, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: \$3,687.50	1/8
124-710 (Chapman Snungayah)	SW1/4NW1/4 and NW1/4 SW1/4 Sec. 16, and El/2SE1/4 Sec. 17, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: \$1,820.80	1/24
124-711 (Martie Snungayah)	SE1/4 Sec. 18, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: \$1,837.50	1/8
124-1569-A (Charlot Edwards)	NE1/4NW1/4 Sec. 35, T. 11 N., R. 19 E., W.M., WA., cont. 40 acres, m/l. Appraised value: \$39,400.00	1/1
124-1850 (Julia Edwards)	E1/2SW1/4SE1/4 Sec. 8, T. 11 N., R. 18 E., W.M., WA., cont. 20 acres, m/l. Appraised value: \$1,350.00	1/8
124-4491 (Lillian Pitt)	Lots 3 & 4 and Sl/2 NW1/4 Sec. 1, T. 7 N., R. 14 E., W.M., WA, cont. 163.00 acres, m/l. Appraised value: \$34,692.00	1726/3780

Total Value on Yakima Reservation ----- \$171,787.80
Yakima Agency IIM Account No. P-166 as of D.O.D ----- None
Yakima Agency IIM Account No. P-166 as of 4/15/75 ----- \$1,798.80
Total Value of Yakima Estate ----- \$173,586.60

January 6, 1976. I hereby certify that the foregoing is an accurate inventory according to the records of the Yakima Indian Agency, Toppenish, WA 98948, of the trust real property or interests therein

A valuation hearing was held at Toppenish, Washington, on June 8 and 21, 1976, for the purpose of determining the fair market value of devisees' interest in the trust properties on the Yakima Reservation. The parties stipulated and agreed as to the fair market value of all of decedent's interest on the Yakima Reservation inherited by the devisees other than the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491. 3/

fn. 2 (continued)

owned by Edward Lewis Pitt, Yakima Allottee No. 124-4490, at the time of his death, December 30, 1973.

The above values are based on appraisals performed by staff appraisers of the Bureau of Indian Affairs.

Realty Officer

3/ UNITED STATES DEPARTMENT OF INTERIOR, OFFICE OF HEARINGS AND APPEALS

In the Matter of the Estate of)	
EDWARD LEWIS PITT,)	STIPULATION OF VALUE
)	CONCERNING PORTIONS OF
Deceased Allottee)	DECEASED'S PROPERTY
124-4490 of the)	
Yakima Indian Agency)	
of the State of)	
Washington)	

COME NOW Robert Free, on behalf of the heirs of Edward Lewis Pitt, and Tim Weaver, on behalf of the Yakima Indian Tribe, and stipulate and agree that:

1. The fair market value for Edward Lewis Pitt's interest in Tract No. 124-1569-A (Charlot Edwards) is \$39,400.00.
2. The fair market value of Edward Lewis Pitt's interest in Tract No. 124-1850 (Julia Edwards) is \$1,350.00.
3. The fair market value of Edward Lewis Pitt's interest in Tract No. 124-709 (Minnie Parker) is \$6,746.00.
4. The fair market value of Edward Lewis Pitt's interest in Tract No. 124-710 (Chapman Snungayah) is \$3,067.00.
5. The fair market value of Edward Lewis Pitt's interest in Tract No. 124-711 (Marti Snungayah) is \$2,789.00.
6. The fair market value of the interest of Edward Lewis Pitt in the forest land and young growth trees on Tracts 124-4490 (original allotment) and 124-4491 (Lillian Pitt) is \$56.00 per acre for forest land and \$34.00 per acre for non-forest land.

Upon conclusion of the valuation hearing, Judge Snashall issued what he termed a "Final Order" dated December 9, 1976, wherein he found, among other things, the purchase and taking by the Yakima Indian Tribe on September 3, 1975, of certain trust properties of the above-entitled estate referred to in footnotes 1 and 2, a verification of the Yakima Tribe's deposit into the estate account of \$171,787.80 less certain allowable credits; that the interested parties entered into a written stipulation as to decedent's interest

fn. 3 (continued)

Having made the above stipulations and agreements, the parties agree that the only material issues of fact remaining to be resolved in an evaluation hearing, are the fair market values of merchantable timber on Tracts 124-4490 and 124-4491.

DATED this 22 day of June 1976.

MacDONALD, HOAGUE & BAYLESS

By _____
Robert Free
Attorneys for Heirs of Edward Lewis
Pitt

HOVIS, COCKRILL & ROY

By _____
Tim Weaver
Attorneys for Yakima Indian Tribe

in the trust properties on the Yakima Reservation, referred to in footnote 3, leaving solely for determination the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491.

Dennis Marlowe, real estate appraiser for the Bureau of Indian Affairs, appraised the merchantable timber as of June 9, 1976, as follows: Tract No. 124-4490 (fair market value) \$139,412.72 and Tract No. 124-4491 (fair market value) \$119,848.72. Alton Cronk, a consulting forester, appraised the merchantable timber on said tracts as of March 3, 1976, as follows: Tract No. 124-4490 (fair market value) \$183,891 and Tract No. 124-4491 (fair market value) \$171,200. Mr. Cronk also appraised the same properties as of June 21, 1976, as follows: Tract No. 124-4490 (fair market value) \$186,347, and Tract No. 124-4491 (fair market value) \$173,528.

Although other appraisals were offered by the interested parties, the Judge found that the appraisals referred to in the previous paragraph were the only ones currently applicable as of the date of hearing.

Judge Snashall found the highest and best use of the property to be forest land for the production of timber; that there was no conflict as to the estimated timber volumes on Tract Nos. 124-4490 and 124-4491 as of June 9, 1976; that the Western Wood Products Association Ponderosa Pine Index for 1971 was \$183.81 and that this

Index when adjusted to June 1976 by the adjustment figure of 1.329 (arrived at by taking the average of the Western Wood Product Association Ponderosa Pine figures for March, April and May which were \$241.40, \$246.28 and \$245.27, and dividing it by \$183.81), gave a basic selling price for June 1976 of \$243.29; that the sales value of by-products (chip value) was \$16.51, giving a total net value of the subject Ponderosa Pine of \$259.80; that total production costs of said pine were \$138.46 as to Tract No. 124-4490 and \$141.25 as to Tract No. 124-4491, giving a stumpage value for Tract No. 124-4490 of \$124.34 and for Tract No. 124-4491 of \$118.55; that Douglas Fir was forty-two percent (42%) and Lodgepole Pine was twenty-five percent (25%) of the Ponderosa Pine value; that the cash market value of the merchantable timber on Tract No. 124-4490 was 1325 MBF of Ponderosa Pine at \$121.34 per MBF, 37 MBF of Douglas Fir at \$50.96 per MBF and 52 MBF of Lodgepole Pine at \$30.34 per MBF, for a total stumpage value of \$163,238.70; that the cash market value of the merchantable timber on Tract No. 124-4491 was 1152 MBF of Ponderosa Pine at \$121.34 per MBF and 110 MBF of Lodgepole Pine at \$30.34 per MBF for a total stumpage value of \$142,121.08; and that devisees' fractionated interest in Tract No. 124-4491 was 1726/3780.

Judge Snashall concluded, among other things, that the use for which the interests in the property in question is taken is a special consideration use in the United States in trust for the Yakima Indian Tribe; and that the just compensation to be paid by

the Tribe for the taking of the merchantable timber on Tract No. 124-4490 is \$163,238.70 and Tract No. 124-4491 is 1726/3780 of \$142,181.08, with interest at eight percent (8%) per annum on the total of said amounts in excess of \$171,787.80 from September 3, 1975, until the deficiency is paid into the estate IIM Account.

The Yakima Tribe appealed contending, among other thing that:

(1) The Court erred in its apparent ruling that petitioners had satisfied their burden of proof.

(2) The Court erred in determining that the date of valuation should be the date of trial, i.e., June 1976.

(3) The Court erred in applying its formula for determining the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491.

(4) The Court erred in determining the Yakima Tribe was liable for interest in the amount of eight percent (8%) per annum on any excess amounts above \$171,787.80 from September 3, 1975, until such deficiency is deposited to the estate's account.

Preliminary to consideration of the merits of the case and the contentions of the Yakima Tribe, after a review of the implementing regulations concerning the Act of August 9, 1946, as amended by the Act of December 31, 1970, the Board finds said regulations to be controlling. We further find said regulations as they apply to this matter to be clear and unambiguous.

Pursuant to these regulations when a deceased Indian is shown to have owned a trust estate in and on the Yakima, Warm Springs, or Nez Perce Reservations, the probate proceedings relative to determination of heirs, approval or disapproval of a will and the claim of creditors shall first be concluded as final for the Department. The decision is referred to as the probate decision. 43 CFR 4.301(a).

In the probate decision, a special preliminary finding shall be made showing those interests in land on the reservation which pass to specific heirs or devisees, subject to a statutory option in the Tribe to take at its fair market value. If an appraisal or a supplemental thereof of the property has been filed, the summary, regardless of the date, shall be attached to the decision for the information of the parties subject to further revisions pursuant to 43 CFR 4.304.

Immediately upon a probate decision becoming final, a notice of finality and an order of distribution of the estate shall be issued at the end of a period of 65 days and mailed by the Judge to the parties in interest including the Tribe. 43 CFR 4.301(b).

The Tribe may then elect within 45 days of the date of mailing the notice, and not thereafter, to take under the statute all or part of the available interests specified in the probate decision. Notice of election shall be filed by the Tribe with the Judge. Copies shall simultaneously be mailed by the Tribe to the affected heirs or devisees and the Tribe shall file a certificate that this has been done. The right to distribution of all unclaimed interests not included in the election to take shall accrue to the heirs or devisees upon the expiration of the 45-day period. Ibid.

Upon the expiration of the 45 days allowed to the Tribe, any affected party aggrieved by the findings in the probate decision relative to the appraisal shall file within 20 days a complete statement of all of their reasons for disagreement with such findings and if a hearing is desired the demand shall be made at the same time. Copies of the statement and demand shall be mailed by the filing party to all other affected parties including the Tribe. 43 CFR 4.301(d).

The Judge, upon receipt of a demand for a hearing, may set a time and place and serve notice thereof to all affected parties not

less than 20 days in advance of the hearing. At the hearing each party attacking the valuation of the interests shown by the appraisal report shall have the burden of proving his own position. 43 CFR 4.305.

Upon conclusion of the hearing, the Judge shall issue a decision which shall determine all of the issues presented by the objections and the demand for hearing. The decision shall include findings of fact and conclusions in each case with a judgment establishing the fair market value of the interests to be taken by the Tribe. 43 CFR 4.306.

Nothing shall prevent the parties from entering into binding written stipulations with each other. 43 CFR 4.307.

Where no objection or demand for hearing nor stipulation is timely filed, the Judge shall make an independent finding of and a judgment as to the fair market value of the interest to be taken. In support thereof the Judge may, with or without a hearing at his sole discretion, require other and further necessary documents or evidence as to value in addition to the appraisal report or any admissions in the stipulation in the record. Ibid.

The Judge shall issue a decision, a notice thereof with copy of said decision attached, to all parties in interest. An aggrieved

party may appeal to the Board within 60 days of the mailing of the notice and copy of the decision. 43 CFR 4.308(a).

Upon the expiration of 60 days from the date of mailing the notice of decision or the expiration of 2 years following the date of death of the decedent, whichever date shall be later, the pendency of the estate shall terminate. 43 CFR 4.309.

Within 20 days after the decision becomes final the Tribe shall file with the Superintendent a specific list of the interests it elects to take with the names of the heirs or devisees affected, and it shall be conclusively presumed that the Tribe has released all claim to any interest not listed and not paid for as provided in the next paragraph. 43 CFR 4.310(a).

Simultaneously with its election the Tribe shall pay in to the Superintendent not less than 10 percent of the fair market value of all interests included in its list, said part payment to serve as earnest money and liquidated damages payable to the affected heirs or devisees in the event of a default of full payment by the Tribe. 43 CFR 4.310(b).

The Tribe is obligated to pay the balance of the fair market value to the Superintendent for the affected parties plus interest

on the unpaid balance at a rate of 8 percent per annum within 1 year from the date of filing the election to take. 43 CFR 4.311.

During the pendency of the probate and up to the date of the payment of the earnest money by the Tribe all income received or accrued from the land interest taken by the Tribe shall be credited to the estate account to be distributed to the creditors or to the heirs or devisees. 43 CFR 4.312(a).

Following payment of the earnest money by the Tribe, all income from the interests in land taken by the Tribe shall be held by the Superintendent for the Tribe pending the payment of the balance of the fair market value plus interest and upon such payment the income shall be paid over to the Tribe, but upon default by the Tribe, the income shall be credited to the account of the heirs or devisees. The Tribe may elect to default in making full payment as to any or all interest they previously elected to take. 43 CFR 4.312(b).

Upon payment by the Tribe of the full fair market value as determined for an interest or interests, the Superintendent shall issue his certificate to the Judge that this has been done, and the Judge shall make a finding that the fair market value as determined in the decision previously entered has been paid by

the Tribe and upon such finding the Judge shall issue a decision that the United States holds the title to such interest in trust for the Tribe. 43 CFR 4.313.

In this case, after the probate decision was issued, the Tribe elected on or about July 25, 1975, to purchase all of devisees' interests in the trust properties located on the Yakima Reservation.

On December 29, 1975, the devisees protested the appraisal incorporated in the November 11, 1975, order of distribution, asserting it to be below the fair market value and at the same time requested a hearing.

A hearing was held on June 8 and 21, 1976, pursuant to section 4.305 of the regulations, wherein among other things, testimony was taken first from Alton Cronk, a consulting forester, for the devisees, and then from Dennis Marlowe, real estate appraiser, Bureau of Indian Affairs. In addition to said testimony, several appraisal reports that were prepared by Messrs. Cronk and Marlowe were submitted and included in the record.

Judge Snashall issued a decision and order entitled "Final Order" on December 8, 1976, wherein among other things, he concluded that as of June 9, 1976, the fair market value of the merchantable timber on Tract No. 124-4490 to be \$163,238.70 and on Tract No. 124-4491 to be \$142,121.08.

We consider it appropriate at this juncture to review the Tribe's contention that the Court erred in its apparent ruling that devisees had satisfied their burden of proof. The record is replete with evidence submitted by the devisees, the preponderance of which clearly establishes that the values set forth in the appraisal report attached to the probate decision of July 16, 1975, were below fair market. Moreover, stipulations entered into by the parties on June 22, 1976, as to fair market value of land interests included in said appraisal report would further tend to refute the Tribe's contention. We find that the devisees did satisfy their burden of proof regarding the insufficiency of the appraisal report attached to the July 16, 1975, probate decision.

Upon the issuance of Judge Snashall's December 8, 1976 decision, the Tribe had a right to appeal to the Board. Had the Tribe chosen not to appeal, upon the expiration of 60 days from the mailing of the last notice of decision required in 43 CFR 4.308, the Tribe could have exercised its option to take devisees' interest by filing within 20 days after the decision became final, a specific list of interests it elected to take in keeping with 43 CFR 4.310(a) and simultaneously paying in to the Superintendent not less than 10 percent of the fair market value of all the interests included in the list pursuant to 43 CFR 4.310(b).

The Tribe elected to exercise its right to appeal and did appeal to this Board.

Upon the issuance of the Board's decision, which is final for the Secretary, and upon the expiration of 60 days from the mailing of the last notice of decision required by 43 CFR 4.308, the Tribe then will have 20 days within which to exercise its option to take devisees' interests by filing with the Superintendent a specific list of interests it elects to take and simultaneously pay in to the Superintendent 10 percent of the fair market value of all the interests included, said part payment to serve as earnest money and liquidated damages payable to affected heirs or devisees in the event of a default of full payment by the Tribe. See 43 CFR 4.310(a) and (b).

We find that only a statutory option exists in the Tribe to take upon issuance of the probate decision. We further find that no rights vest in the Tribe until such time as the full fair market value is paid in to the Superintendent. See 43 CFR 4.313.

Consequently, the Judge erred in finding the properties in question were taken on September 3, 1975; that the United States holds the properties as of November 11, 1975, in trust for the Tribe; that all income received or accrued from the land interest accrued to the benefit of the Tribe after September 3, 1975; and

that interest on the unpaid balance began to run from September 3, 1975.

We find that title to said trust properties did not vest in the United States in trust for the Yakima Tribe on November 11, 1975, and would not until an election is made by the Tribe at the proper time in keeping with the regulations, and the full market value of said trust properties as determined by the Board herein is paid into the estate's IIM account. The trust properties in question therefore shall remain vested in the United States in trust for the decedent's estate. In addition, all income received or accrued from the land interest since September 3, 1975, shall be credited to the estate account.

We admonish the Superintendent not to make distribution of any of the Tribal funds transferred to the deposit of the estate or any interest accruing therefrom from the time of deposit since at this point in time said funds and interest therefrom continue to belong to the Tribe.

We turn now to the question of the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491 on June 9, 1976.

As previously stated, testimony was offered by Alton Cronk, a consulting forester, and Dennis Marlowe, real estate appraiser, Bureau of

Indian Affairs, who appraised the land and the merchantable timber on said tracts and prepared several appraisal reports that were submitted and made a part of the record.

In arriving at the fair market value of the merchantable timber on the tracts in question, Alton Cronk used what is referred to as a transaction base comparability appraisal method. In describing this method, Mr. Cronk stated: "I determine or find out what has taken place in the market place by actual sales and the best measure of this in my judgment was Forest Service sales that were sold in a comparable timber in an area adjacent to the Yakima Reservation." He selected basically, two districts on the Snoqualmie National Forest, the Teton and Naches Districts. The transactions that he selected were what he considered to be open market transactions for a period of October 1, 1975, to March 30, 1976, all of the sales assertedly had a preponderance of Ponderosa Pine on them.

An examination was made of the comparables used by Mr. Cronk, namely, the Devil Rim sale, the T-7 sale, the Flat Salvage sale, the Devil Swamp sale, the Gold Creek sale and the Louie sale, which sales were used by Mr. Cronk to arrive at the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491. Among other things, consideration was given to the acreage of each sale, volume of Ponderosa Pine, and the statistical high bid per MBF. It is noted that the comparable sales bid per MBF that

Mr. Cronk used ran from \$3 per MBF to \$117.43 per MBF. In addition, although Mr. Cronk asserted that he judged by grade, Ponderosa Pine was not graded in the Flat Salvage sale and the Devil's Swamp sale.

The Board is constrained to find that the sales used by Mr. Cronk were not realistic comparables applicable to Tract Nos. 124-4490 and 124-4491. Consequently, in arriving at the fair market value of the merchantable timber on the tracts in question, little or no weight is given by the Board to the transaction base comparability appraisal method used by Mr. Cronk as it relates to the comparables used vis-a-vis the tracts in question.

We have equally examined the direct appraisal method used by Dennis Marlowe in arriving at the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491. After a complete and thorough review of the record we find the direct appraisal method to be more just and equitable than the method used by Mr. Cronk. Consequently, we adopt same in arriving at the fair market value of merchantable timber on Tract Nos. 124-4490 and 124-4491 as of June 9, 1976. The record clearly sets forth the direct appraisal method. Consequently, we do not find it necessary to repeat it again here.

We therefore find that the fair market values of merchantable timber on Tract Nos. 124-4490 and 124-4491 on June 9, 1976, are as follows:

Tract No. 124-4490

Ponderosa Pine:

Sales value of lumber	\$226.19
Sales value of by-products	<u>14.30</u>
Total Net Value	\$240.49
Less Production Cost	<u>138.46</u>
Stumpage value per MBF	\$102.03

Douglas Fir:

Sales value of lumber	\$217.53
Sales value of by-products	<u>14.30</u>
Total Net Value	\$231.83
Less Production Cost	<u>153.55</u>
Stumpage value per MBF	\$ 78.28

Lodgepole Pine:

Stumpage value per MBF	\$25.51
Ponderosa Pine--1325 MBF @ \$102.03	\$135,189.75
Douglas Fir--37 MBF @ \$78.28	\$ 2,896.36
Lodgepole Pine--52 MBF @ \$25.51	<u>\$ 1,326.52</u>
Total Stumpage Value	\$139,412.63

Tract No. 124-4491

Ponderosa Pine:

Sales value of lumber	\$229.56
Sales value of by-products	<u>14.30</u>
Total Net Value	\$243.86
Less Production Cost	<u>142.25</u>
Stumpage Value per MBF	\$101.61

Lodgepole Pine:

Stumpage value per MBF	\$ 25.40
Ponderosa Pine--1152 MBF @ \$101.61	\$117,054.72
Lodgepole Pine--110 MBF @ \$ 25.40	<u>2,794.00</u>
Total Stumpage Value	\$119,848.72
A 1726/3780 interest in \$119,848.72	\$54,724.57

To recapitulate, the Board finds the following:

- 1) The implementing regulations referred to, supra, are controlling in this matter.

Moreover, they are clear and unambiguous.

2) The devisees did satisfy their burden of proof regarding the insufficiency of the appraisal report attached to the July 16, 1975, probate decision, the record being replete with testimony and exhibits offered by the devisees which clearly establish the values set forth in the foregoing report to be below fair market value.

3) The fair market value is to be determined as of the date of the hearing. See 43 CFR 4.304 and 4.307.

- 4) That only a statutory option exists in the Tribe to take after a probate decision is issued.

5) No property rights vest in the Tribe until such time as the full fair market value is paid in to the Superintendent.

6) Title to said trust properties did not vest in the United States in trust for the Yakima Tribe on November 11, 1975, and will not until such time as a proper election is made after this decision becomes final, in keeping with the regulations and full market value of said trust properties as determined by the Board herein is paid into the estate's IIM account. The trust properties in question therefore shall remain vested in the United States in trust for decedent's estate until the above is complied with.

The Superintendent is again admonished not to make distribution of any of the Tribal funds transferred to the deposit of the estate, or of any interest accruing from the time of deposit until the present, except to the Tribe, since at this point in time said funds and interest continue to belong to the Tribe.

7) The fair market value as of June 9, 1976, of merchantable timber on Tract No. 124-4490 is \$139,412.63.

8) The fair market value as of June 9, 1976, of a 1726/3780 interest in merchantable timber on Tract No. 124-4491 is \$54,724.57.

9) Upon the expiration of 60 days from the mailing of the last notice of decision required by 43 CFR 4.308, the Tribe may within 20 days thereafter file with the Superintendent the specific list of interests it elects to take, and pay in to the Superintendent not less than 10 percent of the fair market value of the interests included in the list. Interest begins to accrue at the rate of 8 percent on the unpaid balance from the date of such election and deposit. 43 CFR 4.311 and 4.312.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Final Order entered by Administrative Law Judge Robert C. Snashall on December 8, 1976, is hereby MODIFIED in accordance with the findings and dictates set forth above.

This decision is final for the Department.

Done at Arlington, Virginia.

Mitchell J. Sabagh
Administrative Judge

We concur:

Wm. Philip Horton
Administrative Judge

Alexander H. Wilson
Chief Administrative Judge